No. 92-94

In The

# Supreme Court of the United States

October Term, 1992

LARRY ZOBREST, SANDRA ZOBREST, husband and wife; JAMES ZOBREST, a minor, by LARRY and SANDRA ZOBREST, his parents,

*Petitioners,*

v.

CATALINA FOOTHILLS SCHOOL DISTRICT,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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## INTEREST OF AMICUS CURIAE

This brief is filed by consent of the parties. Letters indicating consent are on file with the Clerk.

The Institute for Justice is a nonprofit, tax-exempt, public interest law center that promotes empowerment of individuals as free and responsible members of society through litigation in support of choice in education, economic liberty, private property rights, and freedom of speech.

This case raises issues of direct and immediate concern to those who seek expanded educational opportunities for youngsters who are disadvantaged either by physical disabilities or socioeconomic circumstances. The Institute for Justice represents economically disadvantaged children who are denied basic educational opportunities in public schools, and parents who seek to gain for their children quality education in a safe and positive environment. The Institute and the individuals we represent believe an essential part of the solution to the crisis of inner city public education is to transfer from government to parents the power to decide how and where to use the public funds allocated for their children's education. Some parents so empowered would send their children to religiously affiliated schools. Since this case speaks directly to the remedial use of public funds in religiously affiliated schools, *amicus curiae* has an urgent interest in the outcome and rule of law established by this case.

## STATEMENT OF THE CASE

*Amicus curiae* adopts petitioners' statement of the case and facts.

## SUMMARY OF ARGUMENT

The rule of law established by this case will affect not only the remedial provision of educational services to physically disabled children in religious schools, but also efforts to expand educational opportunities to socio-economically disadvantaged youngsters by allowing parents to use public funds to choose public or private schools for their children. We therefore urge the Court to provide clear guidance for courts and policymakers in fashioning programs that accord with the establishment clause of the First Amendment.

In applying the principles set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1972), we urge the Court to focus on the real world consequences of the challenged program to determine its "primary effect" and whether it impermissibly entangles the state and religion. Where public funds are used to secure educational opportunities in religiously affiliated schools, we believe the appropriate inquiry is whether the challenged program (1) confers preferential treatment upon religiously affiliated schools or merely places such schools on an equal footing with other schools, (2) directly subsidizes religiously affiliated schools or instead conditions receipt of public funds on the independent choices of parents or students, and (3) establishes active state surveillance and interference with



religiously affiliated schools or merely creates such oversight as is reasonably necessary to ensure that the public purpose is fulfilled. These factors would provide clear constitutional guidance in accordance with the purposes of the establishment clause and this Court's precedents, as well as with the compelling interests of equal educational opportunities and parental liberty.

## ARGUMENT

### I. THE ESTABLISHMENT CLAUSE SHOULD BE APPLIED IN A MANNER THAT DOES NOT UNDULY HAMPER REASONABLE EFFORTS TO EXPAND EDUCATIONAL OPPORTUNITIES AND PARENTAL CHOICE.

Twenty-eight years after *Brown v. Board of Education*, 347 U.S. 483 (1954), established the constitutional imperative of equal educational opportunities, our nation continues its quest to fulfil that promise. The frontiers of this quest today encompass not only overcoming past racial discrimination, but extending opportunities to youngsters who are disadvantaged by physical disabilities or economic circumstances. For youngsters to overcome these disadvantages, access to educational opportunities is absolutely essential.

Ironically, the very opportunities necessary to bridge the gap between the "haves" and "have-nots" in our society often are out of reach to those who need them most. Scholars on both sides of the ideological divide have recognized these educational disparities and the compelling need to redress them. *See, e.g.*, J. Kozol, *Savage*

*Inequalities* (1991); C. Murray, *Losing Ground* (1984). Private schools can play an important role in expanding educational opportunities to disadvantaged children. *See, e.g.*, P. Hill, *et al.*, *High Schools with Character* (1991); J. Coleman, *et al.*, *High School Achievement* (1982). Likewise, many educational reformers now have concluded that an important part of the solution is giving parents of disadvantaged youngsters greater choice and control over their children's schooling. *See, e.g.*, J. Chubb and T. Moe, *Politics, Markets & America's Schools* (1990).

The challenged program here reflects congressional recognition of the important role of private schools and parental choice in providing educational opportunities to physically disabled children. The statutes in question provide special services on a nondiscriminatory basis to all disabled children, whether their parents have selected for their basic education a public, private, or religiously affiliated school. *See Zobrest v. Catalina Foothills School Dist.*, No. 89-16035 (9th Cir. May 1, 1992) (App. A-5 n.1). Likewise, disabled children for whom a "free appropriate public education" is unavailing in the public schools are entitled to tuition reimbursement at private schools. *School Comm. of the Town of Burlington v. Dep't of Educ. of Massachusetts*, 471 U.S. 359 (1985).

For economically disadvantaged children as well, efforts to expand educational opportunities also encompass private schools, for "public schools enjoy no monopoly on education in low-income areas." *Aguilar v. Felton*, 473 U.S. 402, 422 (1985) (O'Connor, J., dissenting). In the past year, legislation in 39 states has been introduced or



initiated to give parents greater choice over their children's schooling. American Legislative Exchange Council, *Legislative Update*, Issue IV. The Wisconsin Supreme Court this spring upheld the Milwaukee Parental Choice Program, which allows up to 1,000 low-income children to use their share of state education funds in private, nonsectarian schools. One justice explained the program's purpose:

> The Wisconsin legislature, attuned and attentive to the appalling and seemingly insurmountable problems confronting socio-economically deprived children, has attempted to throw a life preserver to those Milwaukee children caught in the cruel riptide of a school system floundering upon the shoals of poverty, status quo thinking, and despair.

*Davis v. Grover*, 480 N.W.2d 460, 477 (Wis. 1992) (Ceci, J., concurring).

The principle of separation of church and state should not inadvertently or unnecessarily be pressed into service to defeat these vital secular goals. This is not to suggest that education reform programs should not be drafted carefully to avoid offending the important values reflected in the establishment clause of the First Amendment, but rather that religious liberty and parental liberty do not at all necessarily conflict. Clear guidance from this Court is necessary to harmonize these two important interests; and as we argue below, a common sense application of the establishment clause principles reflected by this Court's precedents provides the appropriate framework for resolving possible conflicts involving state-supported educational opportunities in religiously affiliated schools.

## II. THE ESTABLISHMENT CLAUSE DOES NOT PROHIBIT EDUCATIONAL OPPORTUNITIES ENCOMPASSING RELIGIOUSLY AFFILIATED SCHOOLS WHERE SUCH OPPORTUNITIES ARE NEUTRALLY AVAILABLE AND CONDITIONED UPON INDEPENDENT CHOICES OF PARENTS.

We take as our focus of establishment clause analysis the test set forth in *Lemon v. Kurtzman*, 403 U.S. at 612-613, under which a state program encompassing religiously affiliated schools must satisfy three standards: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion' " (citations omitted). A reasonable application of these standards would uphold the challenged program here as well as other remedial programs that include religiously affiliated schools among the range of educational options.

1. The secular purpose of the program here is undisputed. That concession should not conclude this portion of the establishment clause inquiry, however. Most court decisions devote only cursory attention to the "secular legislative purpose" test, as did the Ninth Circuit below (App. A-8 – A-9). We urge closer attention to this inquiry, for the first and second *Lemon* tests necessarily are interconnected. The importance attached to the state's objectives, and the extent to which the program is closely tailored to achieving those objectives, may as a practical matter determine the program's primary effect.

A program designed to address not merely valid but compelling governmental objectives is not likely to have



as its "primary" real world consequence the advancement or inhibition of religion. Here, as with the "primary effect" test, the inquiry should focus on whether the religiously affiliated institutions themselves are an object of the legislation (such as subsidies limited to private schools), or whether they are among the options available to fulfil an important governmental objective (such as remedial educational opportunities). *Compare, e.g., Lemon, id.* (salary supplements to nonpublic school teachers), with *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986) (vocational rehabilitation assistance).

The program here provides special services to physically disabled youngsters. In so doing, it places disabled youngsters on an equal footing with others with regard to educational opportunities. Moreover, by making these services available regardless of whether the parents choose public, private, or religiously affiliated schools, the program preserves parental liberty to direct the upbringing of their children, a principle deeply embedded in our constitutional tradition. *See, e.g., Pierce v. Society of Sisters*, 268 U.S. 510 (1925). A program clearly designed to achieve such important secular objectives is not likely to have more than an incidental effect on religion, and hence the danger of establishing religion is remote.

2A. That the program at issue here[1] neither is intended nor has the primary effect of advancing religion

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[1] As a threshold matter, the court of appeals clearly erred in focusing on the individual circumstances of the petitioners. Rather, the court should have directed its inquiry "to the nature and consequences of the program *viewed as a whole*." *Witters*, 474 U.S. at 492 (Powell, J., concurring) (emphasis in original).

is demonstrated by the program's neutrally available benefits and by the variable of parental choice. These two factors ensure that the values reflected by the establishment clause are protected.

In cases involving the use of public funds in religiously affiliated schools, there arises, of course, no danger of religious coercion, which is a central concern of the establishment clause. *Lee v. Weisman*, 112 S. Ct. 2649 (1992). Rather, what is required is for "the government to maintain a course of neutrality . . . between religion and non-religion." *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985). The concern in such cases is whether "the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." *Id.* at 372. In other words, the inquiry is whether the use of the funds raises "an inference that the State itself is endorsing a religious practice or belief." *Witters*, 474 U.S. at 493 (O'Connor, concurring in part and concurring in the judgment).

Applying these principles, this Court repeatedly has held that "direct state aid to parochial schools that has the purpose or effect of furthering the religious mission of the schools is unconstitutional." *Aguilar*, 473 U.S. at 422 (O'Connor, J., dissenting). Conversely, "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private choices of individual beneficiaries." *Witters*, 474 U.S. at



490-91 (Powell, J., concurring); *accord id.* at 493 (O'Connor, J., concurring in part and concurring in the judgment); *Mueller v. Allen*, 463 U.S. 388 (1983).

This rule is a highly practical one that speaks directly to the concerns of the establishment clause. Programs that provide the same opportunities to students regardless of the schools they attend – such as special services for all handicapped youngsters as here, or state funds made available to public schools or to students opting out of them – steer precisely the neutral course between religion and non-religion charted by the establishment clause. *See, e.g., Meek v. Pittenger*, 421 U.S. 349, 360 (1975); *Bd. of Educ. of Central School Dist. No. 1 v. Allen*, 392 U.S. 236 (1968). Such programs create "no financial incentive for students to undertake sectarian education," nor do they "tend to provide greater or broader benefits for recipients who apply their aid to religious education." *Witters*, 474 U.S. at 488 (majority).

Moreover, "the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State." *Id.* Thus, the choice to use "neutrally available state aid" to pay for education in religiously affiliated schools does not "confer any message of state endorsement of religion." *Id.* at 488-489. As the Court aptly concluded in *Mueller*, 463 U.S. at 400, the "historic purposes of the Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case."

Applying these principles here, the challenged program satisfies constitutional scrutiny. The court of appeals plainly erred when it stated that the "public aid would not be channeled to the sectarian school through the decision of an individual" (App. A-11). In reality, *no* public funds or services ever cross the threshold of a religiously affiliated school *unless* the parents independently have elected to enroll their children in such a school. The funds and services are available to all youngsters in a class defined without respect to religion. The aid creates no incentive to choose religiously affiliated schools; on the contrary, parents who do so must pay tuition they would not have to pay in the public schools. Under these circumstances, this program quite obviously is "not one of 'the ingenious plans for channeling state aid to sectarian schools that periodically reach this Court.' " *Witters*, 474 U.S. at 488 (citation omitted). Its primary effect is to aid disabled youngsters to obtain appropriate educational opportunities, not to advance religion.

2B. The second half of the "primary effect" test is whether the challenged program inhibits religion. Here the program does not do so, but the decisions below themselves have the perverse primary effect of inhibiting religious liberty.

In this case, the issue is whether the establishment clause compels the government to deny a profoundly deaf youngster services necessary for his education solely because his parents' religious beliefs impel them to choose a religious school. If young James Zobrest attended any other non-religious school, private or public, he would receive these services. Such discrimination



hardly serves the constitutional requirement of neutrality between religion and non-religion.

The Zobrests clearly have the right to choose a religiously affiliated school for their son. *Pierce v. Society of Sisters, supra*. Compelling the Zobrests to surrender this right in order to be eligible for a benefit to which they otherwise would be entitled amounts to an unconstitutional condition. *Nollan v. California Coastal Commission*, 483 U.S 825 (1987). As Chief Justice Burger observed in *Meek v. Pittenger*, 421 U.S. at 386-387 (concurring in the judgment in part and dissenting in part),

> If the consequence of the Court's holding operated only to penalize *institutions* with a religious affiliation, the result would be grievous enough; nothing in the Religion Clauses of the First Amendment permits governmental power to discriminate *against* or affirmatively stifle religions or religious activity. [Citation omitted.] But this holding does more: it penalizes *children* – children who have the misfortune to have to cope with the learning process under extraordinary heavy physical and psychological burdens, for the most part congenital. This penalty strikes them not because of any act of theirs but because of their parents' choice of religious exercise.
>
> . . .
>
> The melancholy consequence . . . is to force the parent to choose between the 'free exercise' of a religious belief by opting for a sectarian education for his child or to forego the opportunity for his child to learn to cope with – or

> overcome – serious congenital learning handicaps, through remedial assistance financed by his taxes.

[Emphasis in original.]

The establishment clause compels no such harsh result. As the Court emphasized in *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947), the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." *Cf. Widmar v. Vincent*, 454 U.S. 263 (1981) (equal access to school facilities). Hence with respect to the provision of transportation services to all schoolchildren, the Court declared,

> While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.

*Everson*, 330 U.S. at 16. The same result should obtain here: far from prohibiting the nondiscriminatory provision of remedial services to all youngsters regardless of religious belief as the challenged program here does, the First Amendment is designed to ensure precisely the neutrality toward religion the program reflects.

3. The third test of *Lemon*, 403 U.S. at 621, requires assurance that "comprehensive measures of surveillance



and controls will not follow" public funds or services into religiously affiliated schools, and that the challenged program will not "require a permanent and pervasive state presence" in the schools. *Aguilar*, 473 U.S. at 413. These standards are necessary not only to prevent excessive administrative entanglement between the state and religiously affiliated schools, but also to preserve the independence and integrity of the schools.

Applying these standards in common sense fashion should entail examining whether the program imposes no more than the minimal standards and oversight necessary to ensure that public objectives are satisfied, without any continuing day-to-day presence in the schools or influence over the school's internal affairs. For the reasons described in Judge Tang's dissenting opinion in the court of appeals (App. A-27 - A-32), we agree the program as administered does not excessively entangle the state with religious institutions.

## CONCLUSION

As Judge Tang declared in his dissenting opinion, the court of appeals ruling below "exalt[s] form over substance at the expense of handicapped children" (App. A-19). Clear guidance on establishment clause standards is necessary to foster efforts to expand precious educational opportunities for disadvantaged children. Where such efforts include the provision of funds or services that children may use in religiously affiliated schools, such programs satisfy establishment clause requirements if they (1) do not discriminate in favor of religiously

affiliated schools, (2) depend upon the independent choices of parents, and (3) do not impose the state into the day-to-day operations or internal affairs of the school. In the interest of equal educational opportunities for America's most disadvantaged children. *Amicus curiae* urges this Court to affirm these standards and reverse the ruling below.

Respectfully submitted,

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